REAL PROPERTY

FIXTURES — RECORDING OF CONDITIONAL SALE CONTRACT AS NOTICE TO PURCHASERS OF REALTY

A furnace was sold on a conditional sale contract which provided that it remain personal property. The contract was recorded under G.C. 8568. A prior mortgagee of the realty who received no actual notice of the conditional sale contract, foreclosed and purchased the realty. The controversy is between such purchaser without actual notice of the conditional sale contract and the furnace company, the vendor named in it. The lower court held for the furnace company. The Court of Appeals for Trumbull County reversed that judgment. The Supreme Court held that a furnace is a fixture and that the recording of the conditional sale contract did not give constructive notice to the subsequent purchaser of the realty.[1]

Using the threefold test of attachment, appropriation, and intention as laid down in *Teaff* v. *Hewitt*,[2] the court found that a hot air furnace is a fixture. Previous Ohio lower court decisions on this question are conflicting[3] as are the holdings of the courts in other states. The problem involved in considerably broader than the sale of hot air furnaces. Refrigerators and refrigerating systems, oil burning water supply systems, greasing pits, sprinkler systems, lighting fixtures, gas ranges, built-in beds, elevators, bowling alleys, concrete silos, and industrial equipment of every description have been sold on contracts which have provided that they remain the property of the vendor. The courts have held that they are fixtures in so far as it may affect third parties without notice of the agreement.

Conceding that a furnace is a fixture, the controversy between the vendor and a prior mortagee of the realty to which it has been attached was determined in favor of the prior mortgagee in *Twentieth Cent. Heating and Ventilating Co.* v. *Home Owners Loan Corp.*[4] The authorities are reviewed in a note in a previous number of the journal.[5] The provision that the article is to remain personalty after installation and until paid for would be binding between the parties[6] and anyone who

[1] *Holland Furnace Co.* v. *The Trumbull Savings and Loan Co.*, 135 Ohio St. 48, 19 N.E. (2d) 237, 13 Ohio Op. 325 (1939).

[2] 1 Ohio St. 511, 59 Am. Dec. 634 (1853).

[3] *Holland Furnace Co.* v. *Joy*, 32 Ohio N.P. (N.S.) 17 (1934); *Twentieth Century Heating & Ventilating Corp.* v. *Home Owners' Loan Corp.*, 56 Ohio App. 188, 10 N.E. (2d) 229, 24 Ohio L. Abs. 56, 6 Ohio Op. 23 (1937).

[4] *Supra.*

[5] 4 O.S.L.J. 246.

[6] *Case Mfg. Co.* v. *Garven*, 45 Ohio St. 289, 13 N.E. 493 (1887).

took with notice.[7] It would not affect a subsequent *bona fide* purchaser without notice of the contract.[8]

This is the first clear holding that, under the Ohio act, a recorded contract of conditional sale of a chattel which becomes a part of the realty does not give constructive notice to a subsequent purchaser of the realty. The ruling was to be expected. It is in accord with prior decisions dealing with chattel mortgages.[9] Decisions under the chattel mortgage section on the question of notice are applicable to questions of conditional sale.[10] The decision is consistent with the common practice of title searchers who do not look outside of the real property records of the county in which the realty is located. Only those instruments filed in the county of the situs of the real property give constructive notice. The contract of conditional sale may be filed in the county where the person signing the instrument resided at the time of its execution.[11] This may or may not be the county where the realty to which it is subsequently attached lies. It can never be seriously suggested that a conditional sale contract filed in any one of the eighty-eight counties in Ohio should give constructive notice to a purchaser of real estate located in another county. Undoubtedly this decision, though consistent with the rules of law upon which it is based, works a hardship upon the conditional vendor of property which may become a fixture. The Ohio Supreme Court is of the opinion that, "the law herein expressed furnishes the better rule since it gives certainty to real estate titles and avoids confusion and litigation.[12] Admitting the truth of this statement does not relieve the conditional vendor from his plight. A number of suggestions have been advanced to aid him.

(1) The Ohio Supreme Court suggests the mechanics lien. This is highly unsatisfactory for the purpose of the vendor. Title to his property passes to the purchaser. He cannot repossess it upon default of payments nor can he foreclose upon the article itself but must bring foreclosure on the whole of the realty, a highly troublesome and expensive procedure, one pregnant with business-destroying publicity. The mechanics lien is definitely not the answer to the installment vendor who wishes quietly and inexpensively to repossess his property.

(2) A real property mortgage has been suggested.[13] It is open to

[7] *Simmons* v. *Pierce*, 16 Ohio St. 215 (1865); *Hunt* v. *Bay State Iron Co.*, 97 Mass. 279 (1867); *Haven* v. *Emery*, 33 N.H. 66 (1865).

[8] *Case Mfg. Co.* v. *Garven, supra; Brennan* v. *Whitaker*, 15 Ohio St. 446 (1864).

[9] *Brennan* v. *Whitaker, supra.*

[10] *Columbus Merchandise Co.* v. *Kline*, 248 Fed. 296, 15 Ohio L.R. 525 (1917).

[11] G.C. 8568.

[12] *Holland Furnace Co.* v. *Trumbull Savings and Loan Co., supra.*

[13] *Brennan* v. *Whitaker, supra; Garven* v. *Hogue and Donaldson*, 9 Ohio D.R. 501, 14 W.L.B. 175 (1885).

the same objections and the additional difficulty of the ingrained reluctance of home owners to subject their property to mortgages.

(3) Sec. of the Uniform Conditional Sales Act, adopted in ten states but not in Ohio, provides that recordation of the instrument shall give constructive notice and that the instrument shall be filed in the office where a deed of the realty would be recorded. The vendor has a right to his property unless its removal would cause material injury to the freehold. The "institutional theory" of material damage, developed in New Jersey[14] and subsequently adopted in Pennsylvania,[15] substantially defeats the purpose of the act by considering the removal of any fixture essential to the functioning of the property as an institution as a material injury. The Pennsylvania legislature avoided the operation of the institutional theory by amending sec. 7 so that, upon proper filing, the conditional vendor may always remove his goods but is liable to a prior mortgagee or owner of the realty for the physical damage done to the structure.[16] The New York Court of Appeals has not adopted this view but takes from the operation of the law only those fixtures, the removal of which would cause actual physical damage to the realty.[17]

In the definite belief that there does exist a need, it is submitted that the problem could be solved in Ohio by legislation of a nature similar to the Uniform Conditional Sales Act or by admission of the conditional sale contract to the real property records by legislation to that effect. The objection that it would not be found in a normal search would then be overcome. A conditional sale contract filed with the real property records today would not give constructive notice. No statutory provision is made for its presence there[18] and the filing and recording of an instrument for the recording of which the law makes no provision, is without legal effect.[19] Thus a record of a contract whereby owners of real property covenated not to sell to one not of the caucasian race does not constitute constructive notice because its record is not provided for by statute.[20] If there is any question whether the article is a fixture, duplicates might be filed, one with the real property records. This provision would detract but little from the effectiveness of an already confused real property system of notice. R. C. H.

[14] *Lumpkin* v. *Holland Furnace Co.*, 118 N.J.Eq. 313, 178 Atl. 788 (1935).
[15] *Central Lithograph* v. *Eatmor Chocolate Co.*, 316 Pa. 300, 175 Atl. 697 (1934); *Holland Furnace* v. *Suzik*, 118 Pa. Super. 405, 180 Atl. 38 (1935).
[16] Pa. St. Ann. Purdon, 1939 Supp., Tit. Sales, Sec. 404.
[17] *Maffer* v. *Beverly Development Corp.*, 251 N.Y. 12, 166 N.E. 787 (1929).
[18] G.C. 2757.
[19] *Ramsey* v. *Riley*, 13 Ohio 157 (1844).
[20] *Stanton* v. *Schmidt*, 54 Ohio App. 203, 186 N.E. 851 (1931).